IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 10TH APRIL 2007 / 20TH CHAITHRA 1929

SA.No. 692 of 1993()

AS.175/1985 of SUB COURT, CHERTHALA
OS.184/1979 of ADDL. MUNSIFF,ALAPPUZHA

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APPELLANT/APPELLANT/DEFENDANT:

THANKACHAN C.KOILPARAMBIL, CHERTHALA SOUTH MURI
CHERTHALA SOUTH VILLAGE, ARTHUNGAL, P.O. CHERTHALA.

BY ADV. SRI.K.S.HARIHARAPUTHRAN
SRI.GEORGE MATHEW

RESPONDENTS/RESPONDENTS/PLAINTIFFS:

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1. ST.GEORGE CHURCH, ARTHUNGAL, CHERTHALA
REP, BY THE VICAR, REV.FR.XAVIER CHIRAMEL.

2. POLLAYIL DEVASSY JOHN, POLLAYIL HOUSE
ARTHUNGAL P.O. CHERTHALA, KAIKARAN
REPRESENTING ST. GEORGE CHURCH.

3. ELASSERIL JOSEPH TOMY, ELASSERIL HOUSE
ARTHUNGAL P.O., CHERTHALA KAIKARAN
REPRESENTING ST. GEORGE CHURCH.

4. PALAIKAL SEBASTIAN GEORGE ALIAS BABY
PALAIKAL HOUSE, ARTHUNGAL P.O. CHERTHALA
KAIKARAN REPRESENTING ST. GEORGE CHURCH.

5. FR.AUGUSTINE PULITHARA, REPRESENTING
ST. GEORGE CHURCH,RESIDING AT FATHIMA MATHA
CHURCH, KODAMTHURUTHU, KUTHIATHODE P.O.
PIN- 688 533.

BY ADV. SRI.N.N.SUGUNAPALAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 10/4//2007, THE COURT ON 10/04/2007 DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J

R.S.A.377 OF 2003

JUDGMENT

13.4.2007

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 692 OF 1993

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DATED THIS THE 10th DAY OF APRIL, 2007

JUDGMENT

Defendant in O.S.184 of 1979 on the file of Munsiff Court, Cherthala is the appellant. Respondents are plaintiffs. The plaint schedule property admittedly belongs to St.George Church, Arthungal. First respondent is the Vicar and respondents 2 to 4 are the trustees and 5th respondent, the subsequent Vicar. The suit was filed seeking a declaration of title, possession and injunction and for cancellation of Ext.A2 agreement jointly executed by the appellant and respondents. Ext.A2 agreement was executed on 20.7.1978 whereunder appellant was permitted to make a cartable road through the church property and permission was granted to appellant to use the road for vehicular traffic providing that without the permission of the appellant, no other vehicle could be taken through the road. The suit was filed contending that Ext.A2 agreement is void ab initio as the Vicar or the trustees are not competent to execute such a document without the sanction of the Bishop of Cochin and therefore it is not valid and binding and appellant is not entitled to claim any right thereunder. It was also contended that the agreement is vitiated by undue

influence and duress contending that it was got executed at the instance of the C.I on behalf of the appellant. Appellant filed a written statement contending that the Vicar is in possession of the church properties and the Vicar and the trustees are competent to execute the agreement and the appellant and his predecessors have been using a portion of the church property as pathway and they have prescriptory right of easement by prescription over the same and when the church transplanted a coconut tree on the pathway and caused obstruction he filed an application before the Executive Magistrate, Alappuzha which was forwarded to S.I of Police, Cherthala and there was a mediation in the presence of C.I of Police, Cherthala and in that mediation held on 20.7.1976, a decision was taken allowing appellant to construct a road through the plaint schedule property at his expense and Ext.A2 was executed pursuant to that decision and appellant spent Rs.3000/- for constructing the road and respondents are not entitled to obstruct the same and they are not entitled to the decree sought for and the suit is to be dismissed.

2. Learned Munsiff, after framing the necessary issues and recording the evidence of Pws 1 and 2, Dws 1 and 2 and Exts.A1 to A3 and B1 to B6 and C1 and C2, held that Ext.B3 (which is same as Ext.A2) is not binding on the church or

church property as sanction of the Bishop was not obtained and therefore it is not valid and binding on the church property. A decree for injunction and declaration of the right of title and possession of plaint schedule property was granted and appellant was restrained from using the plaint schedule property as a road. Appellant challenged the decree and judgment before Sub Court, Cherthala in A.S.175 of 1985. Learned Sub Judge, on re-appreciation of evidence, confirmed the finding of learned Munsiff and dismissed the appeal. The concurrent decree and judgment is challenged in the Second Appeal.

3. The Second Appeal was admitted after formulating the following substantial questions of law.

i)Whether, for determining the rights and liabilities arising under a contract executed between a church, on the one hand, and a third party, on the other, provisions of Canon Law can be imported when its applicability is not mentioned in the agreement?

ii)whether a suit is maintainable to get a document cancelled, on the ground that the Bishop had not given the sanction to the Vicar, at the same time without producing the sanction from the Bishop for filing the suit?

Iii)Whether the non-mention of Section 60(b) of the

Easements Act in the pleading would deprive the defendant of his right to get its protection, though the essential allegations are contained in the written statement?

4. Learned counsel appearing for appellant and respondents were heard. The argument of the learned counsel appearing for appellant was that under Ext.B3 agreement, appellant was permitted to use a portion of the church property as a road after constructing the road at his expense and appellant was permitted to take vehicles through the road and for granting such permission, sanction of the Bishop is not necessary as the Vicar is competent to grant permission along with the trustees and therefore Ext.B3 is not void and the courts below did not correctly interpret Ext.B3 and the decree is therefore not sustainable. Relying on the decision of this court in Themma V. Infant Jesus Church (2005(4) KLT 296), it was argued that Canon Law has no application to the present case and the Civil Law is to be applied and as the Vicar and the trustees are competent to grant license and a license was granted under Ext.B3 and respondents failed to establish that the agreement was vitiated for any reason alleged in the plaint, courts below should not have granted the decree for declaration or injunction and therefore the suit is to be dismissed.

5. Learned counsel appearing for the respondents argued that the plaint schedule property belongs to the Church and the property can be dealt with only as provided under the Canon Law and the Vicar has no right to alienate, encumber or create any servitude in respect of the church property and courts below rightly found that Ext.B3 is invalid as sanction of the Bishop was not obtained and appellant has no right to use the plaint schedule property under Ext.B3 and therefore there is no reason to interfere with the decree granted by the courts below.

6. A Division Bench of this court in **Themma**'s **case (**supra) was considering the effect of an agreement for sale executed by the Vicar agreeing to sell the church property in favour of the plaintiffs in a suit for specific performance of agreement for sale. The trial court dismissed the suit holding that sanction from the Arch Bishop was not obtained and therefore plaintiff was not entitled to the decree for specific performance of agreement for sale. Before this court it was not disputed that sanction of the Arch Bishop was not necessary as a legal requirement to execute an agreement for sale. The Division Bench held that in a suit for specific performance of agreement for sale, it is not the Canon Law that is to be applied but the Specific Relief Act and when the plaintiffs are prepared

to take the sale deed from the defendants even if it is invalid in the eye of Canon Law the court is not to consider the question of defect in title. It was held that the plaintiffs are entitled to a decree for specific performance of agreement for sale. That principle cannot be applied to the facts of this case.

7. The plaint schedule property admittedly belongs to the church. The property can be dealt with only in accordance with the rules and regulations of the church. Vicar has no independent right over the plaint schedule property. Vicar can act only in accordance with the provisions of the Canon Law. Learned Munsiff and learned Sub Judge, relying on the Canon Law, found that the Vicar is not competent to execute Ext.B2 without the permission of the Bishop. Though learned counsel appearing for appellant vehemently argued that Canon Law has no application and therefore Ext.B3 is valid, I cannot agree with the submission. So long as Vicar has no independent right over the plaint schedule property and can act only in accordance with the provisions of Canon Law which govern the properties of the Church, neither the Vicar nor the trustees can alienate or encumber the property or burden the church property with a right as provided in Ext.B3. The courts below rightly found that Ext.B3 is not valid and binding on church or church properties.

Appellant is therefore not entitled to claim any right to use the road through the plaint schedule property under Ext.B3. Though it was argued that as Ext.B3 is a license and the license has become irrevocable as provided under Section 60(b) of Indian Easement Act, if Ext.B3 is invalid, appellant cannot claim any right thereunder. Even if it is valid the relationship created under Ext.B3 is only that of licensor and licensee. It is not an irrevocable license. Appellant is not entitled to claim the protection under Section 60(b) of the Indian Easement Act.

8. I find no merit in the appeal. It is dismissed. Learned counsel appearing for appellant argued that except this road there is no way available to the property of the appellant and therefore the right of appellant to use the road shall not be affected by the decree. That is not the scope of the suit. Appellant is entitled to work out his remedy in accordance with law.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-

M.SASIDHARAN NAMBIAR, J

S.A.NO.676 /1993

JUDGMENT

9.4.2007